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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA COURIER**

Magalie Roman Salas, Esq.  
Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, DC 20554

**Re: In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for  
Preemption of TN. Code Ann. Section 65-4-201(d) – CC Docket No. 98-92**

Dear Secretary Salas:

On behalf of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), enclosed for filing are an original and twelve (12) copies of Hyperion's Reply Comments in the above-referenced docket. Hyperion has also submitted a copy of its Reply Comments on diskette, formatted in Word Perfect 5.1, to Ms. Janice M. Myles.

Please date stamp the enclosed extra copy of this filing and return it in the self-addressed, postage prepaid envelope provided.

Should you have any questions concerning this filing, please do not hesitate to contact Kemal Hawa at (202) 945-6987.

Very truly yours,

*Kemal Hawa*

Dana Frix  
Kemal M. Hawa

Counsel for AVR, L.P. d/b/a  
Hyperion of Tennessee, L.P.

cc: Janet Livengood, Esq.  
Ms. Janice M. Myles  
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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
AVR, L.P. d/b/a	)	
Hyperion of Tennessee, L.P.	)	CC Docket No. 98-92
	)	
Petition for Preemption of Tennessee Code	)	
Annotated § 65-4-201(d) and Tennessee	)	
Regulatory Authority Decision Denying	)	
Hyperion's Application Requesting	)	
Authority to Provide Service in Tennessee	)	
Rural LEC Service Areas	)	
	)	

**REPLY COMMENTS OF  
AVR, L.P. D/B/A HYPERION OF TENNESSEE, L.P.**

AVR, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), by its counsel, hereby submits these Reply Comments in the above-captioned proceeding. It has been nearly seven months since Hyperion originally requested authority to provide service in areas of Tennessee where competition is prohibited by Section 65-4-201(d) of the Tennessee Code. For nearly seven months, Tennessee consumers in these areas have been denied a right promised them by the Communications Act of 1934, as amended by Telecommunications Act of 1996 ("1996 Act") – the right to a competitive choice of telecommunications service providers.

Not surprisingly, Hyperion's Preemption Petition has been opposed by two Commenters – the Tennessee Regulatory Authority ("TRA") itself, and TDS Telecommunications Corporation, the parent company of four Tennessee entities immunized from competition by Section 65-4-201(d) ("TDS Telecom") (collectively the "Opposing Commenters"). In its voluminous comments on

Hyperion's Preemption Petition, TDS Telecom attempted to distract this Commission from the true issues in this proceeding, asserting various universal service and other public interest concerns in an attempt to salvage Section 65-4-201(d). This Commission should not be misled by TDS Telecom's irrelevant arguments. TDS Telecom has set forth no set of facts, nor could it, that would justify Section 65-4-201(d)'s absolute ban on competition in TDS Telecom's service territory. A review of its comments makes clear that TDS Telecom is not concerned with universal service or any other public interest concern, but rather with the preservation of its own monopoly status.

This Commission should take this opportunity to make clear that state or local statutes, regulations, or ordinances that categorically shield incumbent LECs from competition are impermissible under federal law. There is no reason why, over two years after the enactment of the 1996 Act, consumers should continue to be stifled in their efforts to choose a competitive telecommunications service provider by state laws that have clearly been preempted by Congress. For over seven months, Hyperion has been prepared to deploy an advanced fiber network in TDS Telecom's service territory, but has been unable to do so. For that same period, Hyperion has had to turn away consumers who have expressed an interest in obtaining the new, diversified, and innovative service offerings that Hyperion's advanced network will bring. This proceeding gives this Commission the opportunity to offer guidance to the states, and clarify that no consumers should be denied the benefits of competition in the future.

Hyperion also desires to make it clear that it recognizes that there are important universal service and related issues that need to be addressed in a variety of federal and state proceedings. Such issues are inherent in Congress' determination that universal service support be made explicit, specific, predictable and sufficient. No transition from implicit subsidies to explicit subsidies can

occur without scrutiny. However, TDS Telecom has not demonstrated an explicit need, or that Hyperion's deployment of its network is in any way contrary to the public interest. TDS Telecom has merely made a series of unsupported assertions that universal service in Tennessee may somehow be jeopardized if Hyperion is allowed to compete in its service territory. TDS Telecom simply wants the freedom to close its eyes (and those of its consumers) to competition. Unfortunately for TDS Telecom, Congress has foreclosed debate with respect to such arguments, and has opened all local exchange telecommunications markets to competition.

**I. Section 253(a) of the 1996 Act Proscribes Absolute Prohibitions on Competition**

Section 65-4-201(d) is an absolute prohibition on competition that stands in direct conflict with Section 253(a) of the 1996 Act and should be preempted. Section 65-4-201(d) is a categorical prohibition on competition in areas of Tennessee served by an incumbent LEC with fewer than 100,000 access lines within the state. This statute cannot be reconciled with Section 253(a), which prohibits any state or local government from enacting any statute or regulation that may prohibit or has the effect of prohibiting the ability of any entity to provide any telecommunications service. Both the TRA and TDS Telecom concede in their comments that Section 65-4-201(d) violates Section 253(a), but tenuously argues that the statute falls within Section 253(b)'s limited exception. Their reliance on Section 253(b) is misplaced. Section 253(b) establishes a limited exception where a statute is competitively neutral, necessary to preserve and advance universal service, and is otherwise in the public interest. Opposing Commenters have utterly failed to show that Section 65-4-201(d) is competitively neutral, and has set forth no set of facts, nor could it, that demonstrate that universal service in Tennessee would be jeopardized if the 1996 Act were followed.

**A. Section 65-4-201(d) is Not Competitively Neutral**

Opposing Commenters' contention that Section 65-4-201(d) falls within Section 253(b)'s limited exception is but an attempt to divert attention from the statute's admitted inconsistency with Section 253(a). Moreover, Section 65-4-201(d) does not satisfy a single criterion under Section 253(b). Most notably, Section 65-4-201(d) is not competitively neutral.

Section 65-4-201(d) is an absolute barrier to competitive entry into areas of Tennessee served by incumbent LECs with fewer than 100,000 access lines within the state. As this Commission has made clear time and again, Section 253(a), at the very least, proscribes state and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular state or locality. That is precisely the effect of Section 65-4-201(d). Indeed, this Commission has considered statutes that are virtually identical to Section 65-4-201(d), and found that such incumbent protection provisions cannot be competitively neutral since such provisions award incumbent LECs the ultimate competitive advantage, preservation of their monopoly status, while saddling potential new entrants with the ultimate competitive disadvantage, an insurmountable barrier to entry.

In denying Hyperion's application to provide service in TDS Telecom's service area, the TRA held that Section 65-4-201(d) is competitively neutral since it excludes all new entrants from competing with the incumbent LEC. Logic and common sense mandate a different conclusion. As Hyperion emphasized in its Preemption Petition, no legitimate interpretation of the phrase "competitively neutral" could lead one to conclude that a statute which prohibits any new entrant from competing with the incumbent LEC is competitively neutral. The fact that the TRA had to

resort to such tautological reasoning to support its statute is indicative of the fact that Section 65-4-201(d) is indefensible.

In promulgating Section 253(b), Congress recognized that states may have to adopt certain restrictions on competitive entry into their local exchange telecommunications market. For example, states may require that prior to providing service an entity demonstrate that it has the technical, managerial and financial qualifications to render telecommunications services, or that any entity that wishes to provide service satisfy well defined minimum service quality standards. Such requirements would be permissible under Section 253(b), even though they prohibit or have the effect of prohibiting an entity from competing, since they may, in the discretion of the states, be necessary to preserve and advance universal service and to safeguard the public interest. Congress did not envision that states would invoke Section 253(b) to justify or establish absolute barriers to competitive entry.

**B. Universal Service Considerations Do Not Support Upholding Section 65-4-201(d)**

In denying Hyperion's application to provide service in TDS Telecom's service territory, the TRA expressed a series of amorphous universal service concerns unsupported by any empirical evidence. Since Section 65-4-201(d) fails to satisfy the competitive neutrality element of Section 253(b), the Commission need not even reach the universal service arguments advanced by Opposing Commenters. However, were the Commission to address such arguments, they would certainly have to be rejected. In fact, Opposing Commenters' universal service arguments constitute nothing more than a series of unsupported and speculative assertions.

Section 65-4-201(d) is antithetical to the important universal service goals embodied in the 1996 Act. The 1996 Act states that one of its primary goals is the preservation and advancement of universal service. Hyperion is committed to this goal. If at any point in time TDS Telecom believes that universal service considerations are being jeopardized in Tennessee, it may petition the TRA for relief or institute a generic rulemaking for a broader policy change. In no way, however, is Hyperion's ability to compete with TDS Telecom implicated. This Commission has consistently recognized Congress' intention that universal service concerns be addressed through means other than absolute prohibitions on competition. The TRA has a broad array of options available to it to ensure that universal service in Tennessee is maintained, such as legitimate enforcement actions or the establishment of well defined service quality standards. Hyperion welcomes the opportunity to participate in meaningful discussions with the TRA, and to play an active role in TRA rulemakings and other proceedings designed to ensure that competition as well as universal service are promoted in Tennessee. Hyperion expects that any universal service or other public interest issues will be resolved in specific, predictable, and nondiscriminatory ways. Unfortunately, however, the TRA elected to employ an alternative removed from its authority by the 1996 Act, namely the enforcement of a categorical barrier to competitive entry.

**II. This Commission Should Establish a Clear Precedent Pronouncing That Statutes That Prohibit Competition Will Not Be Enforced Under Federal Law**

This proceeding presents the Commission with a unique opportunity to offer clear and definitive guidance to the states that statutes, regulations, or ordinances that categorically prohibit competition are impermissible under federal law. As stated previously, in denying Hyperion's application, the TRA recognized that Section 65-4-201(d) appears to be preempted by federal law.

However, the TRA, characterizing Section 253(a) as being in its early stages of development, held that it would be premature to capitulate to federal law. Although Hyperion disagrees, and believes that this Commission has made it quite clear in *Silver Star*, the *Texas Preemption Decision*, and *Classic Telephone*, that statutes that prohibit all but a single entity from providing service in an area are impermissible under Section 253(a), there obviously is still confusion on the part of the states with respect to this issue. To eliminate any possibility of further confusion by the TRA and the numerous state commissions charged with the responsibility of interpreting statutes, regulations or policies similar to Section 65-4-201(d), this Commission should articulate a succinct and definite standard, clarifying that Section 253(a) preempts any state and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular state or locality, and that there is no possibility that such a statute can survive under Section 253(b). Moreover, the Commission should also take this opportunity to clarify that Section 251(f) of the 1996 Act (the so-called "rural LEC exemption") was designed only to provide small or rural incumbent LECs with certain relief from the heightened requirements of Section 251(c). Section 251(f) in no way provides any incumbent LEC with protection against competition.

The 1996 Act was designed to bring the benefits of competition to all consumers, and there is no reason why states should impose unnecessary obstacles on CLECs, above and beyond the tremendous obstacles that CLECs already face in competing with monopoly providers. Hyperion merely wishes to bring the benefits of competition to consumers in TDS Telecom's service territory. Not only has it been stifled in its efforts, but it has incurred substantial delay and enormous expense in challenging Section 65-4-201(d). A CLEC's survival is contingent upon its efficient allocation of scarce resources. Hyperion requests that this Commission establish a clear precedent that can be



used in other states to ensure that Hyperion and other CLECs can avoid the unnecessary time and expense of future preemptory challenges.

### **Conclusion**

The 1996 Act was enacted to ensure that all consumers can enjoy the benefits of competition, including better quality services, lower prices, and new and innovative service offerings. In this proceeding, Hyperion has fought to prove an issue that was intended to be foreclosed from debate by the 1996 Act -- namely, that competition is in the public interest. Hyperion urges this Commission to establish a definitive and clear precedent in this case that statutes or regulations that prohibit competition will not be tolerated under federal law.

For the foregoing reasons, Hyperion respectfully requests that this Commission expeditiously grant its petition seeking preemption of Section 65-4-201(d) and the TRA's order denying its application to provide service in areas of Tennessee served by incumbent LECs with fewer than 100,000 access lines and clarify that any statute or regulation that categorically prohibit competition have been preempted by federal law.

Respectfully submitted,



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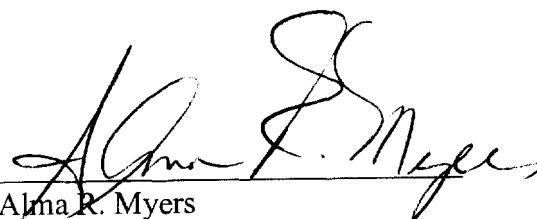
Counsel for AVR, L.P. d/b/a  
Hyperion of Tennessee, L.P.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of July, 1998, a true copy of the foregoing document was served by hand on the parties listed below.

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